Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits

BRIEF OF *AMICI CURIAE* THE CENTER FOR INQUIRY AND AMERICAN ATHEISTS IN SUPPORT OF THE RESPONDENTS

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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of the Government is being filed on behalf of the Center for Inquiry ("CFI") and American Atheists, Inc. ("American Atheists").

CFI is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

American Atheists is a national educational, nonpolitical, non-profit corporation. American Atheists is a membership organization dedicated to advancing and promoting the complete and absolute separation of religion and government, and to preserving equal rights under the law for atheists. American Atheists encourages the development and public acceptance of a humane, ethical system that stresses the mutual sympathy, understanding, and interdependence of all people and the corresponding responsibility of each individual in relation to society.

Amici comprise secular and humanist organizations that advocate on behalf of the separation of religion

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[1] All parties have granted blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

and government and offer a unique viewpoint concerning the importance of religious freedom in the United States. The question of whether the accommodation to the contraceptive mandate is a substantial burden on an entity's religious exercise at issue in this case goes to the core of *amici's* humanist and secular interests in the separation of religion and government. *Amici* are accordingly deeply invested in preserving appropriately stringent judicial scrutiny of what constitutes a "substantial" burden on religion when an exemption has already been granted to a law of general applicability.

SUMMARY OF ARGUMENT

Petitioners, who are religious non-profit groups, claim a religious-based objection to the requirement under the Affordable Care Act ("ACA") to provide health insurance which covers, at no cost to the employee, contraceptive care. 42 U.S.C. § 300gg-13(a). In response to these religious objections, the government offered such non-profits an accommodation, allowing them to sign a form stating their objection, relieving them of the requirement to provide the insurance, and instead requiring the insurance company, at no cost to the non-profit, to provide the required coverage to the employees. 45 C.F.R. § 147.131(c); 29 C.F.R. § 2590.715-2713A(b)(1)(ii). Instead of accepting such an accommodation, petitioners now claim that the act of signing such a form is, in and of itself, a burden on religious exercise. *Amici* claim that granting a further exemption to petitioners is not only unnecessary and not required by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, but would also be a violation of the Establishment Clause.

First, there is no First Amendment, Free Exercise Clause right to the claimed exemption. Congress does not impinge on the right to free exercise by enacting a law of general applicability, even if that law impacts an individual's or a group's ability to practice religion. *Empl. Div. v. Smith*, 494 U.S. 872, 879 (1990). Any exemption granted under RFRA is a legislative, not constitutional, protection, and so must withstand constitutional scrutiny. Exemptions to laws granted to protect individual religious expression are unconstitutional as violative of the Establishment Clause when they shift the burden from the petitioner to a third party. Here, petitioners seek to eliminate their alleged religious burden by creating a burden on their employees who will be denied the seamless and copayment-free contraceptive benefits guaranteed by the ACA.

Second, petitioners cannot demonstrate that they have suffered the requisite "substantial burden" on religion to warrant relief under RFRA. Petitioners have already been offered an accommodation which fully removes any substantial burden on their religious beliefs, which *amici* maintain already violates the Establishment Clause. What petitioners object to is the requirement that they must inform the government of their intention to exercise this accommodation. Such a requirement has never been held to be a burden by this Court. Recognizing it as a substantial burden, as petitioners request, would render the word "substantial" in RFRA meaningless. RFRA has been held to require that when a substantial burden on religion is found that the government cannot justify by pointing to a compelling interest, an accommodation is to be offered to the burdened party. This is precisely what the government has already done. This Court has never held that a

requirement to notify the government of a desire to avail oneself of such an accommodation can itself be considered a substantial burden on religion.

Third, petitioners' theory of causation, allowing them to claim a religious burden caused by requiring them to notify the government of a desire to take advantage of an accommodation, knows no bounds. If accepted, it would not only allow religious groups to refuse to directly participate in legitimate governmental activities, but also to demand that no person act in their place to fulfil the government's intentions. RFRA was never intended to grant religious groups an absolute veto over government policy in this fashion.

Fourth, even if this Court determines that a substantial burden on religion exists, the interest of the government in the widespread provision of contraceptive services to women at zero copayment cost is a compelling one, sufficient to overcome any burden to petitioners.

The exemption sought here by petitioners is therefore not required by the Free Exercise Clause or by RFRA, and, in fact, would violate the Establishment Clause, by creating a burden for third-party employees in order to relieve the alleged burden on petitioners' religious exercise. It must be rejected by this Court.

ARGUMENT

I. PERMISSIVE RELIGIOUS EXEMPTIONS TO LAWS OF GENERAL APPLICABILITY ARE SUBJECT TO ESTABLISHMENT CLAUSE REVIEW

For many years, the availability of exemptions for religious groups or individuals from laws which did not specifically target those religions was governed by

the Sherbert Test, expounded in *Sherbert v. Verner*, 374 U.S. 398 (1963). This test granted exemptions to laws that placed substantial burdens on an individual's or group's ability to practice religion based on the Court's interpretation of the First Amendment right to free exercise of religion. In *Sherbert*, a factory worker was terminated for refusing to work on Saturday – the Sabbath for her religion of Seventh Day Adventism. *Id.* at 399. South Carolina denied her unemployment benefits, claiming she was voluntarily unavailable for work. *Id.* at 401. This Court ruled that the state could not, absent a compelling government interest, condition access to a governmental program such as unemployment benefits by placing a substantial burden on a person's religious freedom – here the right to observe the Sabbath as that person saw fit. *Id.* at 403-04.

However, twenty-seven years later, in *Smith*, the Court ruled that a law which did not specifically target religion, but which had the incidental effect of burdening religious adherents, did not require an exemption. 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is otherwise free to regulate."). Consequently, the state had no obligation to show that the law served a compelling government interest.

In response, Congress enacted RFRA with the express purpose of restoring the Sherbert Test and making the compelling interest test once again the standard of review for government-imposed burdens on religion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1133 (10th Cir. 2013); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J. dissenting, citations omitted) ("RFRA's

purpose is specific and written into the statute itself. The Act was crafted to 'restore the compelling interest test as set forth in *Sherbert v. Verner*.'"). It is important to note that this grants a legislative, not a constitutional right. This Court, in *Smith*, 494 U.S. at 867-82, determined the extent to which the Free Exercise Clause protects individuals from burdens on their religious practice imposed by laws of general applicability. RFRA, as a legislative enactment, granted protections beyond those constitutional rights. Such permissive rights granted by an Act of Congress are subject to constitutional scrutiny. An exemption sought under RFRA which violates the Establishment Clause is not permitted. Congress does not have the authority to violate the Constitution, nor can Congress overrule a Supreme Court determination of the extent of constitutional protections, short of the passage of an actual constitutional amendment. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (The Constitution is "superior, paramount law, unchangeable by ordinary means. . . . [It is not] alterable when the legislature shall please to alter it."). Any exemption claimed under RFRA, such as that sought by claimants here, must therefore pass constitutional review under the Establishment Clause.

Despite being ruled unconstitutional as applied to the states by this Court, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), RFRA has been treated as facially constitutional regarding the federal government.[2] Facial constitutionality does not end the

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[2] *Amici* do not concede the constitutional validity of RFRA, noting that it grants special privileges to religion which violate the Establishment Clause. *See The Religious Freedom Restoration Act Is Unconstitutional, Period*, Marci A. Hamilton, I U. Pa. J. Const. L. 1, 19 (1998-99). Without conceding this, *amici*

scrutiny, as laws may still be applied in ways which violate the Constitution. The Establishment Clause "mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Ark.*, 393 U.S. 97, 104 (1968). A decision that claimants are substantially burdened by a notice requirement set forth in a law of general applicability would make a mockery of RFRA's intent to provide an avenue of relief when the government truly does substantially burden religious practices.

II. GRANTING AN EXEMPTION WOULD VIOLATE THE ESTABLISHMENT CLAUSE BY BURDENING THIRD PARTIES

As discussed, *supra*, the express purpose of RFRA is to defend the freedom of an individual or group to practice religion against restrictions imposed by government. For example, in *Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418, 423 (2006), members of a Brazilian church located in New Mexico were denied permission to use a tea brewed from plants unique to the Amazon Rainforest, because the tea contained a hallucinogen controlled under federal law. Church members drank the tea as part of a religious ritual. This Court ruled unanimously that because the government did not demonstrate a compelling interest in denying the church access to the plants, it must under RFRA accommodate the religious exercise of the church. *Id.* at 439.

The fundamental difference between the exemption requested by the religious group in *O Centro* – the right to take a hallucinogenic substance as part of a religious ceremony – and that sought by petitioners –

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emphasize herein that RFRA should not be extended to legitimize further violations of the Constitution.

the ability to not only not pay for contraceptive insurance for their employees, but also to prevent the insurance company's providing it free of charge – lies in the impact on third parties. When the church members were permitted an exemption from the Controlled Substances Act to drink hallucinogenic tea, no other party was harmed, or indeed impacted at all.[3] The government imposed the burden on the church, and could remove it without impacting the rights of others. Petitioners, however, seek to remove from their employees a right guaranteed to them by the ACA – the right to receive contraceptive coverage with zero copayments. 42 U.S.C. § 300gg-13(a). RFRA permits the government to remove a burden on religious practice created by government action. Shifting a burden from petitioners to third parties, in order to accommodate petitioners' religious beliefs, however, represents a preference being granted to those religious beliefs over and above the beliefs, or lack thereof, of the employees. Such a preference strikes at the very heart of the Establishment Clause. *Epperson*, 393 U.S. at 104.

This Court has rejected religious exemption requests which impose a burden on a third party. A Connecticut law requiring businesses to honor requests from their employees not to work on their Sabbath day was struck as violative of the Establishment Clause because it "took no account of the convenience or interests of the employer *or those of other employees who do not observe a Sabbath.*" *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (emphasis

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[3] *Amici* maintain such a religion specific exemption itself is a violation of the Establishment Clause. *Supra*, n.2. Where exemptions are granted, however, the Constitution mandates that they do not impose harmful burdens on third parties.

added). Similarly a Sabbatarian airline employee was not entitled to a change in his shift structure to accommodate his religious preference for Saturdays off work, as granting that request would "deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *T.W.A. v. Hardison*, 432 U.S. 63, 81 (1977). And in *U.S. v. Lee*, Amish employers were required to continue to pay social security contributions for their employees despite their sincere religious objections because granting such an exemption would harm the interests of the employees who should be able to make their own choice as to the moral implications of involvement in the program. 455 U.S. 252, 261 (1982) (An exemption would "operate[] to impose the employer's religious faith on the employees.").

This Court's decision in *Hobby Lobby*, 134 S. Ct. 2751, that the contraceptive mandate could not be imposed on for-profit, closely held corporations that expressed a religious identity that conflicted with the provision of certain types of contraception, does not change this analysis. Key to the willingness of this Court to grant Hobby Lobby its requested exemption was the existence of the very exemption for non-profits at issue in the instant case. *Id.* at 2786 (Kennedy, J. concurring) ("[T]he Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework."). By allowing for-profit religiously identified corporations to access the same exemption that petitioners, non-profit religious corporations, could access, the burden would not be placed on the third-party employees, who would still receive their coverage. Here, petitioners seek the creation of a whole new scheme that will create

obstacles to their employees' ACA rights, without any consideration of whether those employees will continue to receive the promised benefit and the degree of increased burden they will suffer seeking to obtain it.[4]

The exemption sought in this case therefore replaces any alleged burden on petitioners with a significant burden on a third party – petitioners' employees. Granting such an exemption and imposing such a burden violates the Establishment Clause, and cannot therefore be required by RFRA.

III. PETITIONERS CANNOT DEMONSTRATE A SUBSTANTIAL BURDEN ON THEIR RELIGIOUS BELIEFS

A. Any cognizable burden is relieved by the existing accommodation

For the purposes of this brief, *amici* assume that the contraceptive mandate does impose a substantial burden on petitioners' religious beliefs. What petitioners have failed to acknowledge, however, is that the government has already met any requirement it might have under RFRA to ease that burden, by providing

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[4] The baseline from which we must consider whether a burden has been imposed on a third party is the situation that would exist absent the exemption. *See Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) ("[W]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured."). Therefore the benefit, the availability of contraception without copayment, is considered the baseline for employees. Granting this exemption, and thus removing the benefit from the employees, cannot be seen in any way other than imposing a burden on those third parties in order to accommodate the religion of petitioners. *See supra*.

religious objectors with an accommodation which permits them to opt out of the contraception coverage. Religious claimants such as petitioners cannot demonstrate that a requirement merely to give notice of their religious objection to the contraception coverage requirement represents a "substantial" burden on their religious exercise rights. Absent such a demonstration of a substantial burden, no RFRA claim is cognizable. In the final analysis, petitioners are not claiming that there remains a burden on their religious beliefs. They are claiming that they don't like the method the government provided them to avoid that burden. RFRA provides religious plaintiffs with exemptions in certain limited situations. It does not, however, guarantee to a religious plaintiff the right to dictate to the government the method for implementing that exemption.

As part of regulations established by the Department of Health and Human Services ("HHS") under the ACA, employer group health plans are required to provide "preventive care and screenings" for women per the Women's Health Amendment and "shall not impose any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4). This preventive care requires employers to provide coverage for all forms of contraceptive methods approved by the Food and Drug Administration ("FDA"). 26 C.F.R. § 54.9815-2713; 45 C.F.R. § 147.131(a).

However, HHS also provided a religious exemption to the contraceptive coverage requirement that is available to certain religious entities and to for-profit closely held corporations with a religious objection to the mandate. 45 C.F.R. § 147.131; *Hobby Lobby*, 134 S. Ct. 2571 (extending the contraceptive mandate accommodation to closely held for-profit corporations).

To be eligible for a religious exemption from the contraceptive coverage requirement of the ACA, an organization must certify that it has a sincere religious objection to arranging contraceptive coverage. 45 C.F.R. § 147.131(b); 29 C.F.R. § 2590.715-2713A(a). The organization opts out by affirming that it meets those eligibility criteria via a self-certification form sent to its group health plan issuer or third-party administrator ("TPA"), or a letter to the HHS Secretary. 45 C.F.R. § 147.131(c); 29 C.F.R. § 2590.715-2713A(b)(1)(ii). The notice to HHS must include a list of the forms of contraceptive services that the employer objects to providing, and specify the name of the plan, the plan type, and the contact information for the plan issuer or TPA. 45 C.F.R. § 147.131(c)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). Once an eligible organization avails itself of the accommodation, it has discharged its legal obligations under the regulations. 45 C.F.R. §§ 147.131(c)(1), (e)(2); 29 C.F.R. § 2590.715-2713A(b)(1).

RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person–(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b). As this Court has determined that the contraceptive mandate imposes a substantial burden on religious exercise, within the meaning of RFRA, and ruled against the government, *Hobby Lobby*, 134 S. Ct. at 2785, it is necessary to see what solution has been held to satisfy the requirements of RFRA. Courts have been satisfied when the government has provided a successful

plaintiff with an accommodation to the objectionable aspects of the law. *E.g.* 21 C.F.R. § 1307.03[5] (after *O Centro*, 546 U.S. 418, government created accommodation allowing a person to file for an exception to the Controlled Substances Act); Wis. Stat. § 118.15 (after *Wis. v. Yoder*, 406 U.S. 205 (1972), accommodation allowing parents to remove students from school before age eighteen for religious reasons upon notice to school officials.).

In the present case, the government has *already* provided an accommodation for those non-profit employers who object on religious grounds to the contraceptive coverage requirement. 45 C.F.R. § 147.131(b); 29 C.F.R. § 2590.715-2713A(a). These employers may opt out of the requirement, and by self-certifying their religious objection, they are guaranteed to be granted their accommodation. 45 C.F.R. § 147.131(c); 29 C.F.R. § 2590.715-2713A(b)(1)(ii). This is a much less rigorous process than applying for a religious exemption for hoasca tea under the statutorily imposed process of the Controlled Substances Act where there is no guarantee of the accommodation's being granted. 21 C.F.R. § 1307.03.

HHS has provided a regulatory accommodation allowing a religious employer who objects to paying or

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[5] The relevant regulation states: "Exceptions to regulations. Any person may apply for an exception to the application of any provision of this chapter by filing a written request with the Office of Diversion Control, Drug Enforcement Administration, stating the reasons for such exemption. ... The Administrator may grant an exemption in his discretion, but in no case shall he/she be required to grant an exception to any person which is otherwise required by law or the regulations cited in this section." 21 C.F.R. § 1307.03.

participating in the ACA's contraceptive coverage requirement to avoid doing so. Petitioners, though, seek an exemption *from the exemption*, claiming that filing the paperwork to indicate they do not wish to participate in the contraceptive mandate for religious reasons itself burdens their religion.

B. A requirement to inform the government one has a religious objection to a regulation is not a 'substantial burden'

RFRA does not outlaw any and all burdens on religious freedom which cannot be justified by a compelling government interest implemented in the least restrictive manner possible. It outlaws *substantial* burdens on religious exercise which cannot be so justified. Congress included the word "substantial," and when Congress writes a statute, it does so giving deliberate meaning to the words it uses. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]e have considered ourselves bound to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.'") (citations omitted). "In other words, if the law's requirements do not amount to a substantial burden under RFRA, that is the end of the matter." *Priests for Life v. U.S. HHS*, 772 F.3d 229, 244 (D.C. Cir. 2014), *cert. granted, Priests for Life v. HHS*, 193 L. Ed. 2d 345 (2015).

In *Hobby Lobby*, 134 S. Ct. 2751, this Court was faced with determining the meaning of the word "person" in RFRA. It noted that the first step to be taken was to look to the Dictionary Act, "which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." *Id.* at 2768 (citing 1 U.S.C. § 1). Nothing in that act, however, provides a definition of the word "substantial." Courts have, however, interpreted such a word

frequently, and its meaning is apparent. Dictionary definitions show a common thread. "Substantial" means "[r]eal and not imaginary; having actual, not fictitious existence. ... Important, essential, and material; of real worth and importance." Substantial, *Black's Law Dictionary* (10th ed. 2014). It is that which is "[o]f considerable importance, size, or worth." *New Oxford Am. Dictionary* (3d ed. Oxford U. Press 2010).

A substantial burden, then, stands in stark comparison to a *de minimis* one. It is a burden which carries a certain degree of weight or impact, one that is considered real and significant, as opposed to minor and trivial. Where this Court has been required to determine the meaning of "substantial" in similar situations, it is this element of importance which is emphasized. For example, when determining the meaning of "substantial evidence," this Court found that it is evidence which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). To be substantial, evidence must be enough so as to convince a reasonable person of the conclusion it is put forward to support. *Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

Petitioners rely on a fundamental misunderstanding of RFRA. They claim that the court system has no place in determining the substantiality of a burden on religious practice. While it is true that courts cannot determine religious doctrine, and may therefore accept a claim of a burden on religious belief as sincere, the word "substantial" has a meaning, and it is the role of the court system to determine if a particular burden reaches that level.

In the present case, the claimants have stated that providing the government notice of their religious objection is in and of itself a substantial burden on their religious exercise. Pet.'s Br. *Little Sisters*, et al., 21-22 (Jan. 4, 2016); Pet.'s Br. *Priests for Life* et al., 11-13 (Jan. 4, 2016). But providing written notice of an objection is "the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out." *Priests for Life*, 772 F.3d at 235. This Court can accept that the religious employer believes that providing this notice is against its religious beliefs without finding that doing so is a substantial burden on its religious exercise.

While the courts may allow religious organizations to determine themselves if an activity or prohibition of an activity constitutes a burden for the purposes of that religion, the courts maintain a responsibility to determine if that burden proclaimed by religious groups rises to the level of "substantial," triggering protection under RFRA.[6] With regard to the burden imposed by signing a piece of paper to indicate that a religious non-profit or closely held for-profit is seeking an exemption from the requirements of the contraceptive mandate of the ACA, both the Third and the

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[6] Indeed, petitioners' argument would, by rendering the word "substantial" superfluous, reduce any decision to be made under RFRA to a determination as to whether a belief is sincere (a highly subjective exercise and one which both the courts and the government are wary of wading into) followed by a determination of whether the government had a compelling interest, implemented in the least restrictive manner possible. Congress determined that plaintiffs should have to show a "substantial burden" before their claim was cognizable under RFRA. Petitioners should not be permitted to rewrite an Act of Congress in such a fashion.

Seventh Circuits found, rightly, that any such complicity with a future alleged sin undertaken by a third party after numerous intervening steps was too attenuated to rise to the level of substantiality required to be cognizable under RFRA. *Geneva College v. Sec. U.S. HHS*, 778 F.3d 422, 442 (3d Cir. 2015) ("[W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees."); *U. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2015). ("The accommodation in this case consists in the organization's (that is, Notre Dame's) washing its hands of any involvement in contraceptive coverage, and the insurer and third-party administrator taking up the slack under compulsion of federal law."). Indeed, were such an extended and tortured view of causation by distant complicity to be accepted by this Court, it would lead to illogical and unacceptable consequences. *See infra* § IV.

Given that all government requirements or prohibitions that can impose *any* burden on religion come, by definition, with the threat of a substantial penalty, the meaning of "substantial burden" cannot be tied in this way to the penalty threatened. Interpreting it in this fashion renders it meaningless, and when interpreting an Act of Congress, courts should not assume Congress inserted language without any meaning. *See Cardoza-Fonseca*, 480 U.S. at 432 (The "ordinary and obvious meaning ... is not to be lightly discounted."). Instead, the word "substantial" should be given its common sense, everyday meaning, as this Court has found when looking at the meaning of "substantial evidence." *See, supra.*

C. Compliance penalties are not a 'substantial burden'

Petitioners claim that refusing to provide the required notice of their religious objection will lead to the imposition of fines which are a substantial burden. This argument was accepted by the Eighth Circuit in *Sharpe Holdings, Inc. v. U.S.* 801 F.3d 927, 932 (2015) ("When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, there has never been a question that the government imposes a substantial burden on the exercise of religion."). But the presence of a government sanction of some sort cannot in and of itself make compliance with the law a substantial burden. If all it takes for a burden on religion to be substantial is the claim of the religious group allegedly impacted, and a penalty for non-compliance, then the word "substantial" in RFRA loses all meaning.

All government requirements to act, or to refrain from action, carry a penalty for non-compliance. Any refusal to obey the requirements of government is punishable. If a government requirement is not accompanied by such threat of penalty, that is, if a person is told to take an action, or refrain from an action, but is not penalized for ignoring the government mandate, then there is *no* burden on the individual. Refusal to participate would have no cost, and without a cost for refusal, there is no burden, substantial or otherwise, on religious exercise.

Moreover, petitioners' argument fails because of one simple, yet unavoidable, fact – the government *has already* provided an accommodation, and the accommodation provides a way for the petitioners to avoid the involvement, and the penalties, they find objectionable. All they have to do is let the government

know they want to avail themselves of the accommodation.

It has never been held that religious objectors are permitted to simply ignore a federal or state statute. A conscientious objector cannot simply refuse to turn up when drafted, but must instead file a claim of religious or philosophical objection to combat and may still be required to serve in a noncombatant role. 50 U.S.C. § 3806(j). The religious adherents in *O Centro*, 546 U.S. 418, who continue to drink hoasca tea ceremonially, must still file for an exemption under the Controlled Substances Act or face substantial criminal penalties of up to 20 years in prison or $5 million for a first trafficking offense.[7] 21 C.F.R. § 1308.11. Likewise, looking back to *Yoder*, 406 U.S. 205, parents who wish to remove their children from school on religious grounds are still required by law to inform school officials of this fact or they may be charged with a misdemeanor. Wis. Stat. § 118.15.

The government is not barred by RFRA from creating a rational, efficient mechanism for implementing a religious exemption, and requiring those seeking the exemption to notify the government of their desire to avail themselves of it is indisputably rational and efficient. Petitioners have been granted a method of exempting themselves from a requirement they claim burdens their religious beliefs. RFRA does not under any reasonable interpretation require that petitioners be granted the right to refuse to inform the government of their desire to be exempted.

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[7] U.S. Drug Enforcement Agency, *Federal Drug Trafficking Penalties*, http://www.dea.gov/druginfoo/ftp3.shtml (last visited Feb. 9, 2016).

The nature of the exemption to the draft offered to conscientious objectors is instructive. In order to qualify for status as a conscientious objector, a registrant must submit a claim to the government. This claim "must be made by the registrant in writing." 32 C.F.R. § 1632.2. The individual then appears before a board which considers the documentation submitted, the oral statements of the claimant and of any witnesses presented, and the demeanor of the claimant. 32 C.F.R. § 1632.8. The board then determines which draft classification to give to the claimant. To be exempted, claimants must demonstrate their beliefs and show sincerity. 32 C.F.R. § 1632.6. Were current petitioners to be successful in achieving their requested exemption, this entire structure of seeking conscientious objector status would need to be altered. Petitioners' requested relief would not only permit draftees to prevent the military's replacing them if exempted, but also allow them to claim that even filing a written claim or explaining their grounds for objection to the draft board itself would trigger a future sin and thus is a burden on their religious practices.

D. The accommodation ensures monies will not be commingled

It has been suggested there is a religious exercise burden for the religious employer because there is no way to prevent the monies paid by the religious employer from being commingled with those collected separately for contraceptive coverage by the insurer or TPA. Brief for School of the Ozarks as Amicus Curiae p. 3-4.

Justice Alito in his opinion in *Hobby Lobby* addressed this issue, recognizing that the ACA does not create a pool of employers' contributions, but

rather that the HHS regulations require the plan issuers to have a "mechanism by which to keep premium revenue" from the religious employers segregated from contraceptive coverage payments. 134 S. Ct. at 2784 (citation omitted) ("Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.").

The D.C. Circuit Court of Appeals also addressed this. After the religious employer provides notice that it does not wish to provide contraceptive coverage, the government has provided a way to ensure the employer is separated from the process by arranging for another entity to fill the coverage gap. *Priests for Life*, 772 F.3d at 235.

Separation of funds is a common idea in federal law. Under the federal faith-based initiative, grants awarded to religious organizations cannot be commingled with non-federal funds unless the organization follows all federal grant rules when using all the funds regardless of the source. 34 C.F.R. § 75.52(f). Similarly, the Hyde Amendment, legislation originally passed in 1976, requires segregation of federal funds in the Medicaid program relating to abortion.[8]

In the present case, the contraceptive accommodation provides a similar monetary segregation plan. 45 CFR § 147.131(c)(2)(ii). If the law (which *amici* oppose) expects the American people to trust religious

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[8] Department of Health and Human Services, *Center for Medicaid and State Operations*, http://www.medicaid.gov/Federal-Policy-Guidance/downloads/smd021298.pdf (last visited Feb. 9, 2016).

organizations to act responsibly with tax dollars, religious entities must also trust insurers to act responsibly with their funds. *See Hobby Lobby*, 134 S. Ct. at 2784. An argument that the monies from the religious employer, for health plan costs that are not related to contraceptive coverage, would somehow be commingled or are fungible with insurer-provided contraceptive coverage is not valid and should be rejected by this Court.

IV. PETITIONERS' POSITION DOES NOT CONCERN A BURDEN ON RELIGIOUS LIBERTY, BUT IS RATHER AN ATTEMPT TO LEGISLATE THROUGH THE COURTS

As shown, *supra*, petitioners have failed to demonstrate a substantial burden on their religious beliefs. Indeed, this case represents a concerted effort on the part of petitioners to rewrite RFRA itself. If successful, Congressional intent in passing the law will be overridden. Rather than having to show a substantial burden, any plaintiff claiming religious harm will simply be able to assert that a burden is substantial, and this view will be unchallengeable by the courts, however attenuated and unconnected the government required action and the alleged sin may be. Petitioners have made clear in their briefs their belief that courts have no place in determining whether a burden is substantial. Pet.'s Br. *Priests for Life et al.*, 4 ("Accepting Respondents' view of the court's role in deciding a religious exercise case would fundamentally transform and thus weaken religious freedom by permitting the government (and the courts) to become the arbiters of what does and what does not burden a private party's religious beliefs."). By so doing, petitioners seek to eliminate the word "substantial"

from the text of RFRA, pretending that Congress never included it in the first place.

This case does not involve any substantial burden on religious beliefs. Instead, this case represents no more than a complaint about government policy. Simply put, petitioners do not want their employees to participate in a scheme established by the government for the provision of certain types of health care services. Opposing the use of contraception is petitioners' fundamental right under the First Amendment. However, seeking to prevent an insurance company from providing such services to their employees on asserted religious grounds is different, and this Court and lower courts have repeatedly concluded that such claims founded on dislike for a policy have no merit. Religious disapproval of government policy is entitled to no more deference than political disapproval.

Individuals and employers have often been expected to put their own personal disapproval of a policy, even when based on sincerely held religious convictions, aside and participate in a scheme with which they disagree, when the participation is sufficiently attenuated. While a conscientious objector may not be compelled to serve in the military, for example, a similarly sought exemption from paying taxes to support the military has been repeatedly denied, even to Quakers whose sincere religious belief in pacifism is unquestioned. *Adams v. Commr.*, 170 F.3d 173 (3d Cir. 1999), *cert denied*, 528 U.S. 1117 (2000). In *Adams*, the Third Circuit found that, despite the feasibility of exempting individuals from tax payments, the government had a compelling interest in the uniform collection of taxes, and refused to permit the sincere beliefs of Adams to excuse her from

participation in societal responsibilities such as the payment of tax. 170 F.3d at 180-82.

Participation in a government scheme to which a plaintiff had sincerely held religious opposition was also required by the Court in *Bowen v. Roy*, 476 U.S. 693 (1986). Native American parents claimed that obtaining a social security number for their daughter, Little Bird of the Snow, violated their religion, and therefore they should be exempted from the requirement to produce such a number to qualify for welfare benefits. *Id.* at 695. Chief Justice Burger was dismissive of the idea that actions undertaken by the government, even when attached to the plaintiff's name in this fashion, could create a religious burden. *Id.* at 700. ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."). The use of the number by the government "d[id] not itself in any degree impair Roy's freedom to believe, express, and exercise his religion." *Id.*

This Court has been clear that simply because a religious believer claims substantial harm, "not all burdens on religion are unconstitutional." *Lee*, 455 U.S. at 257. In *Lee*, *id.*, this Court unqualifiedly enforced the rule that religious accommodations sought by an employer, where the exemption granted to the employer would impose burdens on third parties would not be permitted, refusing to grant an Amish employer an exemption permitting him to avoid paying social security contributions for his employees, which would "operate[] to impose the employer's religious faith on the employees." *Id.* at 261. Importantly, this Court acknowledged that Congress

had exempted self-employed Amish from paying social security contributions for themselves, but refused to extend the exemption to contributions for employees, who might not share the same religious convictions. *Id.*

These cases reveal the weakness of petitioners' argument. In *Lee*, *id.*, this Court made clear that, despite current petitioners' repeated assertions, the existence of one or more exemptions does not require further exemptions, even when the religious belief involved is similar. That self-employed Amish were exempted from social security payments did not allow Amish employers to refuse to pay contributions for their employees. *Id.* This Court recognized that the government was entitled to draw a line and limit the exemptions. *Id.* at 260 ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it is a violation of their faith to participate in the social security system."). In this case, as in *Lee*, the government has already provided generous exemptions for churches, and an accommodation for religious nonprofits and closely held for-profit corporations. It is not required to tailor the exemption process to suit every individual or group claiming an exemption nor is it required to broaden the scope of the exemption such that the accommodation has an adverse effect on the rights of third parties.

Bowen, 476 U.S. 693, demonstrates that petitioners simply do not have a sufficient interest at stake in how the government chooses to administer its program. Roy, Little Bird of the Snow's father, sincerely believed that giving his daughter a social security number harmed her spirit, much as petitioners feel that providing the government with a form indicating their

unwillingness to participate in a program that provides contraception involves them in sin. But, as the Seventh Circuit has noted, this belief did not entitle Roy to an accommodation that removed the burden of his providing that social security number on an application for welfare. *U. of Notre Dame v. Burwell*, 786 F.3d 606, 618 (7th Cir. 2015), *petition for cert. filed*, Dec. 18, 2015. Like Roy's claim, petitioners claim is, in the final analysis, a complaint about how the government administers a program. Just like Roy's desire to stop the government's using a social security number for his daughter, petitioners' objection to complying with the current procedures of the exemption to the contraceptive mandate in order to exempt themselves from providing contraceptive coverage is no more of a legitimate basis for an exemption than "a sincere religious objection to the color of the Government's filing cabinets" in which such a form would be stored. *Bowen*, 476 U.S. at 700.

Petitioners' claim that the court system is powerless to even consider the nature of the causation claimed by a religious group seeking an exemption leads to illogical and unacceptable results. The United States has a long history of granting exemptions to conscientious objectors who oppose taking part in military action.[9] However, were petitioners' theory of causation to become accepted, pacifists would have the right not only to insist that they themselves not be sent into

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[9] For many years, these exemptions were available only to those whose objections to war were based on religious beliefs, as opposed to philosophical objections to armed conflict. *Welsh v. U.S.*, 398 U.S. 333, 343 (1970) ("[I]t should be remembered that the former § 456(j)'s exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by 'religious training and belief.'").

combat, but that the military not be permitted to draft someone in their place to fill the space. *U. of Notre Dame*, 743 F.3d at 556. It is inconceivable that such a theory of causation is what the drafters of RFRA had in mind. *Id.* at 557. ("What makes this case and others like it paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths."). Granting such a power to individual conscientious objectors – to not only remove themselves from selection for the military, but also to permanently deprive the military of a replacement out of a belief that their refusal triggered someone else to be sent, and that would be equally as sinful – would be granting religious individuals and groups not only the power to seek exemptions for themselves, but also the power to legislate from the pulpit against the democratic wishes of the population at large.

The breadth of perverse results of such causation is unending. In *Thomas v. Review Bd. Of Ind. Empl. Sec. Div.*, 450 U.S. 707, 709 (1981), a Jehovah's Witness was found to have been wrongly denied unemployment benefits after quitting his job in a roll foundry when he was transferred to a department where he would be producing turrets for tanks for the military, a use he found incompatible with his religious beliefs. While, as petitioners repeatedly assert, the Court did not challenge his personal willingness to make rolled steel which would later be used to make tank turrets, *id.* at 715, petitioners would have us extend Thomas' exemption further. Not content with a right for Thomas to seek a transfer to another position that did not challenge his religious beliefs, petitioners would grant him the right to ensure that no other employee could take over the position he had left, and the spot

on the production line for tank turrets would be permanently empty, in order to spare Thomas the religious burden of having triggered someone else's having to make tank turrets, *however willing that person might be to fill that job*.

Jewish employers may choose not to purchase pork products, and it would violate their religious rights to require them to do so. Yet no court could hold that the same Jewish employers have the right to insist that their employees refrain from using their earnings to purchase bacon. While a Muslim employee may have a religious right to be transferred from a job that involves the sale of alcohol, it is implausible to suggest that the employee possesses an equal right to seek to have that position remain unfilled on the grounds some other cashier who scans a bottle of Cabernet Sauvignon is only in that position because the Muslim employee refused to fill it. And, as noted *supra*, the Amish who were self-employed were permitted to not pay their own social security contributions, as such contributions would potentially undermine the Amish religious principle of self-reliance. This did not, however, allow them to avoid such payments for their employees. *Lee*, 455 U.S. at 261. That employees might possibly be triggered to move away from self-reliance was not held to be a burden sufficient to require an exemption.

The most extreme example of the logical extent of petitioners' theory of causation confronts this Court, and every other court in the United States. Petitioners have argued the Roman Catholic doctrine of "scandal," the act of "leading, by words or actions, other persons to engage in wrongdoing," Pet. for Writ of Cert., 13 n.3 (May 29, 2015) (*citing* Catechism of the Catholic

Church ¶ 2284), to claim that by signing the notification, they are triggering the insurance company to provide the objected-to contraceptive coverage, and are therefore morally complicit in the sin. In order for this Court to find for petitioners, it is necessary to find such a "trigger" theory legally cognizable; or, at the very least, to be sincerely held by petitioners as part of their self-professed Catholic faith.

It is uncontroverted that obtaining or providing an abortion is a sin under Catholic doctrine. Under the doctrine of scandal, or the accompanying doctrine of "material cooperation with evil," *id.* at 13, facilitating abortion, making an abortion easier to obtain, or, indeed, not making an abortion harder to obtain when such an opportunity presents itself, would be a sin. Under this theory of causation, any judge whose personal morality held that abortion was a sin, would also be committing a sin by not restricting abortion. Under petitioners' theory, any court decision which found a constitutional right of a woman to choose an abortion would facilitate such a choice. Of course, no one would suggest that a judge's personal religious or moral code should determine a case regarding constitutional rights. Such matters are to be put aside while a judge applies the law of the land – the United States Constitution. Yet petitioners' theory suggests otherwise, indicating that a judge who ruled, contrary to personal belief, but constitutionally correctly, would be guilty of the sin of scandal.

This then is the logical end of petitioners' theory of causation. If signing a piece of paper indicating a religious-based opposition to providing contraceptive health services, and thereby taking advantage of an exemption to a requirement to provide such services, is in and of itself a substantial burden on religion

through an attenuated "trigger" theory, then so would countless other actions become substantial burdens. Employers would find themselves unable to replace workers they moved to accommodate the individual's religious beliefs. The military would find itself unable to fill its ranks in times of conscription as religious objectors could not be replaced, even by individuals without a religious objection to being drafted. A juror excused from duty on a capital case because of a religious opposition to capital punishment could not be replaced with a substitute, as the presence of a substitute juror's voting in favor of the death penalty was in some way triggered by the initial person's refusal to serve on the panel. Such outcomes were never the intention of RFRA, and must be avoided.

V. THE GOVERNMENT HAS A COMPELLING INTEREST IN ENSURING THE WIDESPREAD AVAILABILITY OF CONTRACEPTIVE SERVICES TO WOMEN

There are enormous benefits that accrue to society from the widespread availability of no-cost contraception to women. There can be no doubt regarding the central role that preventive and reproductive health care plays in enabling women to participate fully in society, and the cost of the provision of such care if it is left up to the individual. Under the ACA, millions of women were, for the first time, given a legal guarantee that their health insurance would cover the cost of all FDA-approved contraceptive services. Petitioners seek to remove that legislative right not only from their own employees, but also, by extension, from millions of other women who are employed by corporations which may seek such religious-based exemptions.

The cost of contraceptive care is far from *de minimis*. Studies have shown that the cost of an intrauterine

device ("IUD"), including the fees for the required medical examinations, insertion, and ongoing follow-up visits, may reach as high as $1,000.[10] Oral contraceptives cost on an annualized basis between $180 and $960, with the cheaper, generic contraceptives often being reported as causing unpleasant side effects.[11] Emergency contraception, such as the "Morning After Pill," ranges in cost from $30 to $65 per dosage.[12]

The costs of purchasing contraception fall largely upon women. Women of child-bearing age pay 68% more than men of the same age in out-of-pocket medical costs. *Hobby Lobby*, 134 S. Ct. at 2788 (Ginsburg, J., dissenting). A significant part of this cost can be attributed to the cost of contraception. Removal of this disparity between health care costs for men and women is, in and of itself, a compelling government interest. This government interest,

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[10] Planned Parenthood, *IUD: Where can I get an IUD? How much does an IUD Cost?*, https://www.plannedparenthood.org/learn/birth-control/iud (last visited Feb. 9, 2016).

[11] Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. Rev. 343, 376 (2014) (noting also that the lower-cost contraceptive pills were less effective in preventing conception).

[12] Planned Parenthood, *Morning After Pill (Emergency Contraception)*, https://www.plannedparenthood.org/learn/morning-after-pill-emergency-contraception (last visited Feb. 9, 2016); purchasing one brand of emergency contraception, Plan B, over-the-counter costs about $50 per use. *E.g.* Walgreens, *Plan D One-Step Emergency Contraception*, http://www.walgreens.com/store/c/plan-b-one-step-emergency-contraceptive/ID=prod6212563-product?ext=gooPersonal_Care_PLA_Emergency_Contraception_prod6212563_pla&adtype=pla&kpid=sku6186077&sst=29fc349b-abfc-52a9-c30f-000046b50d6b (last visited Feb. 9, 2016)

however, even goes beyond the desire to seek greater equality for women. The widespread availability of contraceptives without copayment benefits the government and society by reducing the numbers of unplanned and unwanted pregnancies. This reduces the burden on medical facilities, reduces the burden on schools and social services, and even reduces the number of abortions performed.[13] Studies have indicated that each dollar spent on helping women avoid unwanted pregnancy reduces Medicaid expenditures by $7.09.[14] These savings, combined with the increased ability of women to make their own reproductive choices, enabling them to fully participate in society on an equal basis, represent a compelling interest for the government in ensuring the widespread availability of contraception without copayments.

Petitioners argue repeatedly that the existence of exemptions for some groups indicates that the government interest cannot be considered compelling. This, however, misrepresents the governmental and societal interest at stake in the contraceptive mandate. It is fallacious to suggest that unless the mandate can cover everyone, the government has no interest in enforcing it. The compelling interest here is not that *all* women in the United States should have access to contraception without copayments, but that *as many women as possible* should have this access.

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[13] While *amici* fully defend a woman's right to a legal and safe abortion, they also believe that the availability of low-cost and no-cost contraception, combined with effective education as to their use, would prevent many unwanted or high-risk pregnancies, thus reducing the need for abortions.

[14] J.J. Frost, *et al.*, *Return on Investment: A Fuller Assessment of the Benefits and Cost Saving of the US Publicly Funded Family Planning Program*, 92 Milibank Q. 667, 668 (2014).

Government programs are not an all or nothing matter. The compelling governmental interest in preventing malnutrition among poor children through the SNAP program is not diminished when the program does not reach every child in need. Furthermore, if petitioners' logic were followed through to its end, then no exemption, religious or otherwise, could be offered to any group, as offering it would immediately indicate that there was no compelling interest behind the law in the first place.[15] The government, as is its right, has drawn the line for exemptions. This in no way diminishes the compelling nature of the interests at stake.

CONCLUSION

For the above reasons, this Court should affirm the judgments of the U.S. Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits.

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[15] While *amici* maintain that all religious exemptions are unconstitutional, *supra* n.2, their existence does not diminish the compelling nature of the government interest.